Nos. 74-175 and 74-5176

In the Supreme Court of the United States

OCTOBER TERM, 1975

J. WILLIAM MIDDENDORF, II, ET AL., PETITIONERS

v.

DANIEL EDWARD HENRY, ET AL.

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v.

J. WILLIAM MIDDENDORF, II, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL PARTIES

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This supplemental memorandum is filed in order to update some of the statistics in our main brief and to discuss plaintiffs' claim that this case should be dismissed because they failed to exhaust their military remedies.

1. In our main brief (pp. 23–27), we summarized statistical data showing how application of the judicial requirement of counsel to summary courts-martial [1] has affected the congressional objective of providing a means for prompt and effective punishment for minor military infractions. These statistics indicated that the provision of defense counsel in summary courts-martial has introduced significant delay and reduced the utility of the summary court-martial procedure without producing apparent countervailing benefit to accused servicemen.

Statistics that have become available since the filing of our brief last Term reinforce these conclusions. In both the Army (which began providing counsel in summary courts-martial in mid-1972, shortly after the decision in *Argersinger*) and the Navy (which applied *Alderman* to summary courts-martial beginning June 8, 1973), the number of summary courts-martial sharply declined following the institution of the procedures entailing provision of counsel. The new statistics reflect a continuing trend away from the use of summary courts-martial: [2]

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[1] See *United States* v. *Alderman*, 22 U.S.C.M.A. 298, 46 C.M.R. 298, holding that *Argersinger* v. *Hamlin*, 407 U.S. 25, requires that counsel be made available to indigent servicemen subject to incarceration as a result of summary courts-martial.

[2] Our main brief, p. 23, n. 24, gives the frequency of summary courts-martial from 1964 through 1973. The yearly figures for the two services are statistically not quite comparable. The Army statistics refer to calendar years, whereas the Navy and Marine Corps statistics refer to fiscal (July 1–June 30) years.

Numbers of summary courts-martial per year

Year	Army	Navy
1971	14, 740	14, 097
1972	9, 322	11, 308
1973	6, 434	11, 322
1974	4, 803	8, 941
1975		[1] 8, 677

[1] Interim.

These data suggest that one of the principal effects of the requirement that counsel be provided in summary courts has been to diminish the attractiveness of that procedure as a means for speedy and effective disposition of relatively minor charges and presumably to cause a shift to the use of special courts or non-judicial punishment.[3]

Where the summary court-martial procedure has continued to be used, it has recently proved a far less expeditious procedure than before. While it is not possible to ascribe the changed experience reflected in the following table exclusively to the injection of

[3] Whereas the convening of summary courts-martial declined by 23 percent between FY 1973 (the last full year the Navy did not provide counsel) and FY 1975, the use of special courts-martial not empowered to issue bad conduct discharges—those most nearly comparable to summary courts-martial—increased by 26 percent, while instances of non-judicial punishment increased by 23 percent in that time. Similarly, the Army's use of summary courts declined by 67 percent between 1971, the last full year in which the Army did not provide counsel, and 1974, while the use of special courts-martial dropped by only 44 percent and non-judicial punishment by 31 percent in that time.

counsel into summary court proceedings, we believe it is reasonable to infer that the presence of defense counsel is the principal cause of this phenomenon. The following table, adding to the statistics contained at page 26, n. 26 of our main brief, suggests that counsel have caused relatively little change in the outcome of summary court proceedings but have lengthened by as much as 40 percent the time required to dispose of charges for which a summary court is convened: [3a]

	FY 1973	*CY 1974*
Total summary courts-martial	11,322	8,869
Convictions	10,779	8,297
Acquittals	543	572
Percentage of acquittals	4.8	6.4
Percentage of convictions	95.2	93.6
Average number of days from preferral of charges through final review	32.52	45.40

If both the increased delay and the decreased conviction rate are ascribed to the introduction of counsel into the proceedings, the foregoing statistics indicate that the presence of defense counsel at summary courts-martial has materially diminished the utility of that procedure without any appreciable advantage to the accused. Thus, in calendar year 1974 there were 8,869 summary courts-martial in the Navy; multiplying that figure by 13 (the average number of additional days from preferral of charges to final review in 1974 as compared to fiscal 1973), it appears

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[3a] We have compared FY 1973, the last 12-month period before counsel was provided in summary courts-martial by the Navy pursuant to *Alderman*, with calendar year 1974, the last 12-month period for which final figures are available.

that the presence of defense counsel in summary courts-martial in 1974 created an additional 115,000 man-days during which accused servicemen faced unresolved charges; in the same period, the slightly higher acquittal rate produced about 150 additional acquittals. Under this analysis, each acquittal has thus cost about 770 man-days of delay. This is a high price in view of the fact that the use of defense counsel does not necessarily improve the accuracy of the fact finding process (see our main brief, pp. 41–43), and thus that the additional acquittals do not necessarily represent an improvement in the fairness of the procedures.

These data reinforce our view that the summary court-martial in the form Congress intended—an expeditious non-adversarial procedure—is a reasonable accommodation of the private and governmental interests at stake.[4] The inquisitorial role of the court officer provides a speedy yet fair disposition of minor charges; the interjection of defense counsel into these proceedings has created an adversarial character which lengthens the process without making it mark-

[4] The most recent statistics also reflect that summary courts-martial continue to be utilized for minor—and, generally, purely military—offenses. More than half of all charges tried by summary courts-martial continue to involve unauthorized absence; more than 30 percent of the charges involved other purely military offenses, such as disrespect to a superior or disobedience of an order.

The chart below, updating statistics in our main brief at p. 33, n. 31 (which contained interim data for 1973), shows the num-

edly fairer.[5] In providing for the summary court-martial, Congress deliberately decided to entrust the active conduct of the trial to an impartial officer rather than opposing counsel. This decision is entitled to special deference from the courts, since it is the special constitutional role of Congress to balance the rights of servicemen against the unique needs of the armed forces, *e.g.*, *Burns* v. *Wilson*, 346 U.S. 137,

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bers of charges tried by Navy summary courts-martial under different Articles of the U.C.M.J. and the percentage each type of offenses comprises of the total:

Article Offense	FY 1973		FY 1974	
	Number	Percent	Number	Percent
85–87: Desertion, unauthorized absence, missing movement	8,629	52.8	6,894	52.5
89–92:				
Disrespect, disobedience	3,237	19.8	3,148	24.0
Other military offenses	2,173	13.3	1,273	9.7
121: Larceny	508	3.1	375	2.8
128: Assault	464	2.8	365	2.8
92/134:				
Drug offenses	859	5.3	857	6.5
Other nonmilitary offenses	476	2.9	225	1.7
Total military offenses	14,039	85.9	11,315	86.2
Total nonmilitary offenses	2,307	14.1	1,822	13.8
Total offenses	16,346	100.0	13,137	100.0

Note: Statistics supplied by the Office of the Judge Advocate General, Department of the Navy. The number of offenses exceeds the number of summary courts-martial convened (p. 4, *supra*) because more than one offense may be adjudicated in a single proceeding.

[5] See generally, Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan. L. Rev. 1009 (1974).

140; indeed, this Court has never invalidated a congressional provision governing court-martial proceedings against servicemen.

2. Plaintiffs now claim that the civilian review they sought was precluded by their failure to exhaust two military remedies: (1) a petition for relief to the Judge Advocate General of the Navy, pursuant to Article 69 of the Uniform Code of Military Justice (10 U.S.C. 869);[6] and (2) a petition for *habeas corpus* relief from the Court of Military Appeals pursuant to the extraordinary powers granted by 28 U.S.C. 1651(a) (the All Writs Act). We disagree.[7]

The failure to exhaust is not an absolute bar to a court's assertion of jurisdiction. Rather, application

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[6] Article 69 provides in pertinent part:

"Notwithstanding section 876 of this title (article 76), the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a Court of Military Review may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused."

An accused may initiate an application for relief under Article 69 by submitting a letter to the Judge Advocate General which sets forth the grounds for relief. See *Manual of the Judge Advocate General*, section 0144, 32 C.F.R. 719.144.

The Judge Advocate General of the Navy, as a matter of administrative practice, reviews cases submitted pursuant to Article 69 solely with respect to errors asserted in the application for relief. See *Manual for Courts-Martial*, 1969 (Rev. ed.), par. 110A; *Manual of the Judge Advocate General*, *supra*.

[7] As we indicated in our main brief (p. 4, n. 5), we do contend that the district court improperly asserted jurisdiction over those plaintiffs who were never tried by summary courts-martial. *Schlesinger* v. *Councilman*, 420 U.S. 738, 753–761.

of the exhaustion doctrine to specific cases is a discretionary matter depending upon the doctrine's purposes and the particular system of remedies which precede civilian review in the federal courts. See *McKart* v. *United States,* 395 U.S. 185, 193; *Parisi* v. *Davidson,* 405 U.S. 34, 37; *Schlesinger* v. *Councilman,* 420 U.S. 738, 754; *Gusik* v. *Schilder,* 340 U.S. 128, 132. In light of the military review to date and the purposes of the exhaustion doctrine, this case is ripe for review.

We do not believe that a request for *habeas* relief from the Court of Military Appeals pursuant to the All Writs Act is necessary to exhaust military remedies. Such a request is in the nature of a collateral attack on the conviction, rather than a means of direct review necessary before a judgment can properly be considered finally determined at the appropriate level within the military.

There is, moreover, a substantial question whether the Court of Military Appeals can grant extraordinary relief following a summary court-martial conviction (*e.g., United States* v. *Snyder,* 18 U.S.C.M.A. 480, 40 C.M.R. 192 ; see also *Noyd* v. *Bond,* 395 U.S. 683, 695, n. 7)—especially when, as here, the petitioning servicemen are no longer confined. Thus, the remedy which plaintiffs point to may not exist. *Noyd* v. *Bond, supra,* 395 U.S. at 698, n. 11; *Parisi* v. *Davidson, supra,* 405 U.S. at 44.

Plaintiffs argue that the remedy does exist, because in response to a timely petition for *habeas* relief

by plaintiff McLean, the Court of Military Appeals in February, 1973, ordered the Judge Advocate General of the Navy to show cause why McLean should not be released from confinement on the ground that he had been sentenced to confinement after a summary courtmartial in which he was denied the right to appointed counsel (Plaintiff's Supplemental Memorandum, Exh. A). But the order to show cause indicated only that the court was willing to consider the question of its jurisdiction; there has been no holding that jurisdiction exists.

In any event, following the grant of relief to plaintiffs by the district court in this case, the Court of Military Appeals removed McLean's *habeas* petition from its calendar. That removal, followed by a lapse of two years without further action on the matter, can reasonably be interpreted as a decision to defer to the determination of the federal courts.[8]

For similar reasons, we do not believe that the plaintiffs' failure to seek Article 69 review should bar judicial review under the circumstances of this case. We agree that normally an Article 69 petition for relief is a prerequisite to judicial review. See our response to the certiorari petition in *Wishmeyer* v. *Bolton,* No. 75–5203. But although no such petition has been filed by the servicemen involved in these

[8] Indeed, by order of October 24, 1975, the Court of Military Appeals continued its order holding the action in abeyance, "out of deference to consideration by the United States Supreme Court" of the issue presented by petitioner McLean (USCMA Misc. No. 73–5).

cases, the Judge Advocate General of the Navy has received at least seven Article 69 petitions which allege as error the conducting of summary courts-martial resulting in confinement without provision of counsel to the accused. In each case, the Judge Advocate General has deferred consideration of the petition until litigation on this issue in the federal courts, including this case, has been completed.

Under these particular circumstances, the military has indicated its intention to defer to the civilian courts for the resolution of this matter, and accordingly the traditional purposes of the exhaustion doctrine will not be significantly furthered by requiring additional military review.

These purposes were summarized with reference to military tribunals last Term in *Schlesinger* v. *Councilman*, 420 U.S. 738, 756–757.[9]

> The * * * rule [of exhaustion of administrative remedies], looking to the special competence of agencies in which Congress has reposed the duty to perform particular tasks, is based on the need to allow agencies to develop the facts, to apply the law in which they are peculiarly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by

[9] Contrary to plaintiff's assertions (Supplemental Memorandum, p. 1), this Court's decisions in *Councilman*, *supra* and *McLucas* v. *DeChamplain*, 421 U.S. 21—both rendered after oral argument in this case—raise no "new questions" of jurisdiction, but rather reaffirm traditional principles.

> the agencies' own decisions. It often avoids duplicative proceedings, and often the agency's ultimate decision will obviate the need for judicial intervention. * * *
>
> These considerations apply in equal measure to the balance governing the propriety of equitable intervention in pending court-martial proceedings.

In addition, the doctrine as applied to the review of military tribunals is designed to permit the military to order its own affairs and to minimize friction between military and civilian tribunals. See *Councilman, supra,* 420 U.S. at 757–758; *Gusik* v. *Schilder, supra,* 240 U.S. at 132.

Since both the Judge Advocate General of the Navy and the Court of Military Appeals have deferred to the civilian courts for a resolution of the judicial conflict concerning the right to counsel at summary courts-martial, the purposes of the exhaustion doctrine would not be significantly enhanced by holding that civilian review was premature in this case. Exhaustion of the remedies allegedly remaining here would not develop important facts or refine the issues for review. Most importantly, exhaustion cannot be urged here as a means of avoiding friction between federal and military tribunals. Indeed, if this Court does not determine the constitutionality of summary courts-martial, the disagreement between civilian and military courts would continue and could increase since the conflicting decisions of the Court of Military

Appeals and the Ninth Circuit on this issue would remain unresolved. See our main brief, pp. 8–9.

This Court should resolve these conflicting decisions generated by *Argersinger*.

Respectfully submitted.

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